Supreme Court, U.S.
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No. 98-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, American Institute of Aeronautics and Astronautics, a non-profit institution which has issued no shares to the public, states that it does not have any parent companies or any nonwholly owned subsidiaries.

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INTRODUCTION

Petitioner, Olga Orisek, seeks review of the Second Circuit's summary affirmance of the district court's detailed and thoughtful rejection, as a factual matter, of Petitioner's claim of age, gender and national origin discrimination when she was terminated along with 59 of the non-profit Respondent's 79 employees as a result of loss of its entire funding grant from NASA due to federal budget cutbacks. *See* App. 1a-17a, 18a-21a.[1] Petitioner does not contend that there is any conflict among the circuits with respect to any issue in the Petition, and she cannot demonstrate that the Petition raises any genuine issue of law. Rather, as the Second Circuit correctly determined, the district court applied the correct legal standards in rejecting, as unsupported by the factual record, the alleged circumstantial evidence claimed by Petitioner to support her case. Accordingly, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner claims that she was denied a promotion to a new position in May 1991 and laid off in May 1993 from her position as a Computer Support Analyst at the Respondent, American Institute of Aeronautics and Astronautics (the "Institute" or "AIAA"), because of discrimination by its 49-year-old, female, Director, Barbara Lawrence, based allegedly on Petitioner's age (then 56), gender (female) and national origin (Czech).

The Institute is a nonprofit organization whose New York branch office translates and publishes scientific abstracts and technical programs for the international aviation and

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[1] "App." refers to pages of the Appendix to the Petition for a Writ of Certiorari ("Petition" or "Pet.").

aerospace community. For twenty five years, AIAA-NY was funded almost exclusively by National Aeronautics and Space Administration ("NASA") grants. In December, 1993, because of increasing federal cutbacks, NASA eliminated *all* grant support to AIAA-NY. The loss of this subsidy resulted in the layoff of 59 employees from a staff of 79, office relocation from a space of 27,000 square feet to a 4,000 square foot site, a massive consolidation of job responsibilities, and the loss and outsourcing of once-vital aspects of AIAA activity, including its microfiche and library divisions. App. 3a-5a.

Petitioner was one of almost thirty employees that the Institute was forced to lay off in 1993 alone, due to the loss of NASA funds. A significant number of older, female, foreign nationals were retained *after* Petitioner was dismissed in March: Elena Pomerantsev, age 54; Donka Georgieva, age 64; Lyudmila Krel, age 55; Blanca Nash, age 57; Aseneth Salamanca, age 65; Irene Skipski, age 67; and Faina Radomsky, age 56, and several *younger* American men were laid off around the same time as plaintiff: William Doherty, age 29; Danny Luce, age 43; Alan Shaw, age 44; and John Purdy, age 34. Nonetheless, Petitioner sued her former employer for alleged gender, age and national origin discrimination, following the Equal Employment Opportunity Commission's rejection of each of her claims on their merits. App. 3a-5a, 12a, 15a-17a.

Ms. Orisek's claims are based on two events: (i) her unsuccessful application in 1991 to become the Manager of AIAA's library division, and (ii) the Institute's shift in 1991 from a traditional management hierarchy to a lateral 'team' organization, which, she contends, led inexorably to her 1993 departure. The 1991 restructuring resulted in Ms. Orisek's assignment to a department which included financial support, marketing and computer support services, and managerial expectations that she would in fact perform the computer support and programming tasks set forth in her job description

and performance review goals of the preceding three years. App. 2a-17a.

After the reorganization, however, Petitioner did not use, develop or apply her computer programming skills in a cost-effective fashion. Instead, Ms. Orisek relied on an outside consultant to perform many of her basic job functions and tasks. When the Institute was confronted with fiscal disaster due to the loss of NASA funds in 1993, its department managers were forced to address budgetary restrictions by reviewing staff members to identify the weakest performers. In May 1993, Petitioner was selected for layoff. App. 2a-17a.

This action followed. After completion of the discovery period set by the district court, the Institute filed for summary judgment on the grounds that Petitioner could not demonstrate a prima facie case of discrimination, or that the reason for her 1993 layoff was a pretext for discrimination. App. 2a-3a.

In granting the Institute's motion for summary judgment, the district court assumed for the purpose of the motion that Petitioner's circumstantial evidence met her threshold burden of proving a prima facie case, and placed the onus on the Institute to articulate legitimate non-discriminatory reasons for her dismissal. The district court then found that no discrimination occurred during the Institute's company-wide work force reductions, that "several female foreign nationals of the same age as Petitioner were retained" after she was laid off, and that the decision to dismiss Petitioner was based on work performance problems unrelated to her age, gender or national origin. The district court examined in depth each and every argument raised by Petitioner and determined that no direct or circumstantial evidence existed from which a rational trier of fact could infer that the layoff decision was motivated by discriminatory animus. App. 2a-17a.

The district court also discussed at length the reasons for the Institute's 1991 decision to select another applicant to manage its library, finding that Petitioner's speculation as to why she was not chosen for the position did not support her claim that the Institute's program of downsizing and restructuring was a pretext for discriminatory behavior. The district court therefore appropriately granted summary judgment, and dismissed the complaint. App. 6a-7a, 12a-14a.

The Second Circuit affirmed the judgment of the district court, specifically determining that the district court had applied "the correct legal standards," and that "for substantially the reasons stated by the district court" there were no genuine issues of material fact in dispute which warranted reversal of the judgment in the district court. App. 18a-21a.

REASONS THE WRIT SHOULD BE DENIED

The factually-specific result below, fully explained by the district court's detailed review of the factual record and its analysis of each and every factual and legal assertion of Petitioner, raises no legal issues of any kind. App. 1a-17a. Rather, as specifically and correctly determined by the Second Circuit, the district court found that "under the correct legal standards" Petitioner could not prove that Respondent's stated reason for adverse employment action was merely a pretext for discrimination. App. 19a-21a, at 20a. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

While Petitioner stresses at length the importance of anti-discrimination legislation, a proposition Respondent certainly does not disagree with, each of Petitioner's assertions of a legal issue depend entirely on acceptance of the "circumstantial evidence" she argues she proffered in the district court. However, the district court's extensive quotation from

the undisputed documents in the factual record demonstrated conclusively that, at best, Petitioner's claims were surmise. *See e.g.*, App. 7a-17a.

Thus, the Petition raises no issues of law with respect to the application of the standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Rather, the undisputed documentary record below neither supported the "circumstantial evidence" Petitioner wrongly argues she presented, nor any other factual basis to sustain her claims. Respondent's retention of Elena Pomerantsev, age 54; Donka Georgieva, age 64; Lyudmila Krel, age 55; Blanca Nash, age 57; Aseneth Salamanca, age 65; Irene Skipski, age 67; and Faina Radomsky, age 56, all foreign-born employees, and Respondent's layoff of several *younger* American men, including William Doherty, age 29; Danny Luce, age 43; Alan Shaw, age 44; and John Purdy, age 34, belie any discrimination during the economically-compelled drastic reduction in force that followed, necessarily, Respondent's loss of its entire funding grant. The district court, however, went far beyond just those dispositive facts, and discussed in detail each and every assertion made by Petitioner and the uncontested factual record's inability to support those assertions. *See e.g.*, App. 7a-17a.

Thus, there is simply no reason warranting grant of the Petition. Petitioner's inability to support her case below was due to a failure of proof, not any misapplication of law or any other reason implicating the broad and recurring impact necessary to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 8, 1999.

Respectfully submitted,
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